Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

A & A CONCRETE, INC., an Arizona corporation, and KAYLE ADAMS and SANDY ADAMS, his wife,

Petitioners,

vs.

THE WHITE MOUNTAIN APCHE TRIBE, dba WHITE MOUNTAIN APACHE DEVELOPMENT ENTERPRISE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

CAN THE COURT OF APPEALS FOR THE NINTH CIRCUIT DISMISS A CLAIM BASED UPON 42 USC §1983 AND PENDENT CLAIMS WHERE THE CRITICAL ISSUE IS THE JURISDICTION OF THE WHITE MOUNTAIN APACHE TRIBAL COURT OVER A NON-INDIAN/NON-RESERVATION RESIDENT ON THE AUTHORITY OF NATIONAL FARMERS UNION INSURANCE COMPANY v. CROW TRIBE, 471 U.S. ____, 85 L.Ed.2d 818, 105 S.Ct. 2447(1985) WHEN THE TRIBAL CONSTITUTION CLEARLY DEPRIVES THE TRIBAL COURT OF JURISDICTION OVER BOTH THE SUBJECT MATTER AND THE PERSON?

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STATUTES

42 USC §1983
28 USC §1331

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To The Honorable Supreme Court of the United States:

COMES NOW A & A Concrete, Inc., an Arizona corporation, and Kayle Adams and Sandy Adams, his wife, as Petitioners, pursuant to Supreme Court Rule 21 and submit the following in support of

their Petition for Writ of Certiorari to review a decision and judgment of the Court of Appeals for the Ninth Circuit.

REFERENCE TO OFFICIAL REPORTS

The offical reference to the decision of the Court of Appeals is: An as yet unreported decision, ____ F.2d ____ (1986), contained herein as Appendix "1".

GROUNDS OF JURISDICTION

The jurisdictional basis upon which this petition is founded are:

1. The Decision of the United States Court of Appeals for the Ninth Circuit.

2. The jurisdiction of this Court is invoked under 28 USC §1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF PROCEDURE INVOLVED

Provisions of law applicable to the case are:

a. 42 USC §1983

b. 28 USC §1331

c. The due process clause of the Fifth Amendment to the Constitution of the United States

d. White Mountain Apache Tribal Code, Sections 21.1, 14.7, 14.6

(All as reproduced in Appendix "2")

STATEMENT OF THE CASE

The Court of Appeals for the Ninth Circuit held (Appendix "1") that this Court's holding in National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. ___, 105 S.Ct. 2447 (1985) precluded the Plaintiffs below from testing the jurisdiction of the White Mountain Apache Tribal Court without exhausting tribal court remedies.

The Ninth Circuit further held that denial of the Plaintiffs' Cross-Motion for Summary Judgment based upon res judicata, collateral estoppel and issue preclusion was proper because the interests of the White Mountain Apache Tribe were not so similar to those of the federal government in United States v. Adams, (United States District Court for the District of Arizona, No. 80-202-TUC-JAW) as to bring to bear on this case the principles applicable under those doctrines as applied in the federal courts.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals directly conflicts with the decision of this Court in National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. ___, 105 S.Ct. 2447 (1985) and the cases pertaining to exhaustion of remedies under 42 USC §1983 as well as the settled principles of res judicata, collateral estoppel and issue preclusion applicable in the federal court.

This case has been pending since 1979. It has twice been dismissed by the District Court. The second time without discussion or opinion and has twice been appealed to the Court of Appeals for the Ninth Circuit. The first appeal resulted in a reversal of the Trial Court's dismissal of the Complaint and the case was remanded to the District Court to proceed. Thereafter, the Defendants made a Motion for Summary Judgment which was granted without discussion or opinion. The Ninth Circuit affirmed thus leaving the Plaintiffs, Petitioners here, without any remedy in any court despite the fact that Plaintiffs have never been paid for the material fur-

nished to the White Mountain Apache Housing Authority. The Plaintiffs were driven from the reservation by the actions of the Defendant, Charles Patterson, and due to Writs of Execution issued out of the Tribal Court were deprived of substantial equipment and due to Writs of Garnishment served upon a non-Indian contractor who was building a high school on the Indian reservation, the Plaintiff was deprived of his contractual right to aproximately $300,000.00 in profit that he would have made pouring concrete for that contactor. When the Writ of Garnishment was served, the non-Indian Contractor immediately terminated his contract with A & A Concrete, the Plaintiff corporation which is wholly owned by the individual Plaintiffs, Mr. and Mrs. Kayle Adams.

The Ninth Circuit, in deciding the case below, recognized that federal question jurisdiction attaches when the jurisdiction an Indian Tribal Court is called into question. (Slip Opinion, at pg. 6 of Appendix "1" hereto)

Apparently, the Court of Appeals felt that it was bound to affirm the trial court by virtue of the quote from this Court's Opinion in National Farmers Union Insurance quoted on page 7 of the

Slip Opinion (Appendix "1", pg. 7):

> "The existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."

The Court of Appeals ignored the fact that none of these factors are relevant to the factual posture which is undisputed in this case. That is the pertinent portion of the tribal constitution creating the tribal court provides:

> "Section 21.1 Jurisdiction.
>
> The Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all civil suits wherein an Indian or a member of the White Mountain Apache Tribe is a party. In cases of divorce, the Tribal Court shall have jurisdiction where either the Plaintiff or Defendant is an Indian who is a bonafide resident of the Fort Apache Indian Reservation.
>
> Section 21.2 Acts Submitting to Jurisdiction; Process. (Here, the Constitution contains what amounts to a purported, procedural long-arm statute, which does not grant or create subject matter jurisdiction, but is merely, in substance, an enactment of the Arizona Rule of Civil Procedure 4(e) which is a procedural device for obtaining personal jurisdiction over a Defendant who has a sufficient nexus with the reservation to subject him to long-arm jurisdiction)

> Sub-section (e) This section shall not be construed to extend the jurisdiction of the Tribal Court to suits where no party to the case is an Indian or a member of the Tribe." (Emphasis supplied)

This Court said in Footnote 21 in the National Farmers Union Insurance case:

> "We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction 'is motivated by a desire to harass or conducted in bad faith,' Cf. Juidice v. Vail, 430 U.S. 327, 338, 51 L.Ed.2d 376, 97 S.Ct. 211 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."

Here, it is patent that applying the test mandated by National Farmers Union Insurance Company that the jurisdiction of the Tribal Court is patently prohibited where no party to the case is ... "an Indian or a member of the White Mountain Apache Tribe". To say that an Indian tribe can be a member of itself is a contradiction in terms. As pointed out by the Court in Parker Drilling Company v. Metlakatla Indian Community, 41 F.Supp.2d 1127 at 1137 (AK. 1978):

> "Defendant first contends that the Section 17 Corporation (an Indian corporation for and under the Indian Reorganization Act) is not an 'Indian' within the terms of this statute so that it does not apply to confer jurisdiction abinitio. The Court agrees with this proposition."

Thus, this case comes squarely within the exception created by this Court in National Farmers in Footnote 21 and does not require the exhaustion of tribal court remedies when the tribal constitution itself does not even purport to confer subject matter jurisdiction on the tribal court.

There is yet another reason why exhaustion should not be required in this situation. This Court recognized in Footnote 21, 105 S.Ct. at 254 in the National Farmers case that under appropriate circumstances, that exhaustion would not be required. It has long been settled under the Federal Civil Rights Act, 42 USC §1983 that exhaustion of administrative remedies or exhaustion of state court remedies is not required. Monroe v. Pope, 365 U.S. 167, 81 S.Ct. 475, 5 L.Ed.2d 492 (1961) and McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963).

While we recognize that this is a sui generis case in the sense that a tribal court is unique almost unto itself, the closest possible analogy that can be drawn is to that of an administrative tribunal, or one more step removed, a decision of a state court. Under the teaching of Monroe and

McNeese, when dealing with federall protected constitutional rights, exhaustion is not required. The rationale bohind this rule is well stated in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). There, the Court said:

> "It is no answer that the State has a law which if been forced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and by-laws outlaws unreasonable searches and seizures is not barrier to the present suit in the federal court."

Applying this rationale to the case at hand, the Ninth Circuit's holding that the Petitioner's here are required to exhaust their tribal remedies before resorting to federal court in order to protect their rights under §1983 does not comport with the swift and sure federal remedy granted by the Civil Rights Act. This is particularly brought to bear on this case when one recognizes that by the very terms of the tribal constitution the tribal court does not have jurisdiction over the subject matter of this suit nor of Mr. and Mrs. Adams or their corporation by virtue of the clear provisions of the tribal constitution which only grants jurisdiction to the tribal court in cases

where one of the parties is an Indian. (Tribal Code, Appendix "2")

Finally, all of the arguments which militate in favor of exhaustion of either administrative or state court remedies apply equally to the exhaustion of tribal court remedies. This Court has firmly rejected those arguments almost from the beginning. Monroe, supra. And it is respectfully submitted that they should be rejected when dealing with the White Mountain Apache Tribal Court on the same basis. Ergo exhaustion of tribal court remedies is not required in the present posture of this case.

The Petitioners challenged in both the trial and the appellate court below the ability of the tribal court to afford due process under any circumstances because of the total lack of qualifications or legal training required of White Mountain Apache tribal judges. The Court of Appeals on page 10 of the Slip Opinion brushed aside this due process challenge by saying that the Petitioners did not challenge the qualifications of Judge Goseyun in the tribal court. The Court on page 11 of its Opinion relied upon §14.7 of the Tribal Code permitting disqualification of the

judge on the basis of lack of legal training or ability to conduct a fair trial within the parameters of the 5th Amendment. The totality of §14.7 reads as follows:

> "Section 14.7. Disqualification of Judge to Preside over a Case.
>
> A. No judge shall hear or determine any case in which he has a direct interest or wherein a party or counsel for a party is one of the following relatives:
>
> 1. Uncle or Aunt;
> 2. Neice or Nephew;
> 3. Grandparent or Grandchild;
> 4. Brother or Sister;
> 5. Mother or Father; or
> 6. A spouse of one of the preceding
>
> B. The disqualifications in Sub-section A of this section shall apply whether or not the relationships are based on the whole or half blood, adoption or remarriage.
>
> C. Any party to a proceeding may raise the issue of the qualification of the judge to hear the case."

It is immediately apparent upon reading the above quoted section of the tribal code that the only basis on which a party to the case may challenge the qualifications of the judge is if the judge is related to the other party to the case in the degrees enumerated in Sub-sections A and B. Sub-section C creates no basis other than those specified in Sub-sections A and B upon

which to challenge the qualifications of a judge.

Section 14.6 of the Tribal Code sets forth the only qualifications required to be a judge of the Tribal Court and specifically sets those out as follows:

> "Section 14.6. Qualifications.
>
> Any person over the age of 21 years shall be eligible to serve as a judge of the White Mountain Apache Tribe if he:
>
> 1. is a member of the White Mountain Apache Tribe;
>
> 2. has never been convicted in any court of a felony; and
>
> 3. has not been convicted of a misdemeanor in any court within one year prior to his election, with the exception of minor traffic offenses."

If such a court as so constituted and with the disqualifications being limited to those who are related by blood, adoption or remarriage to the necessary qualifications in order to afford a minimum of due process as that term is known to the Anglo-Saxon law flies in the face of reality, reason and the minimum of a fair trial in a fair tribunal. The Court will note that §14.7 of the Tribal Code does not even provide for the disqualification of the judge for cause or for bias or prejudice.

The White Mountain Apache Tribal Courts have no legally trained judges. One test of the validity of the tribal court system is the existence of an independent court of appeals to which an appeal may be taken. Johnson v. Chilkat Indian Village, 457 F.Supp. 384, (D.Ak. 1978). The testimony of Anna Goseyun, the Chief Judge of the Tribal Court at the time the events occurred, which are the subject matter of this suit, demonstrated that no such independent appeals court existed. Judge Goseyun appointed the appellate judges to hear appeals from her court. Mrs. Goseyun testified in her deposition on page 32 that she has the power to deny an appeal merely by not appointing any appellate judges. She further testified that she was the Chief Judge of the Tribal Court for four years and that there was one other judge and that she had no idea whether he had any legal training or even what his educational background was. She was the one who appointed the appellate judges and all of the judges who were to review any case which she decided were appointed by her. (Depo. of Goseyun, pgs. 24-29)

This Court in In re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955), in deter-

mining the requisite minimum due process requirements for a court, defined the constitutionally mandated minimum which a true court must afford as follows:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that:
>
> 'Every procedure which would offer a possible temptation to the average man as a judge *** not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13." (Emphasis ours) (See the testimoney overall of Mrs. Goseyun)

To state that a member of the Tribe, (as a tribal judge must be) who is elected by the tribal council (Sec. 14.6 of the Tribal Code) and who can be removed or not reappointed by

the council, can preside over a claim by the Tribe itself against a non-Indian in a case where the Tribe seeks to recover $250,000, is to violate by definition the requirement of a "fair trial in a fair tribunal" enunciated by the Supreme Court in Murchison, supra, and its progenitors and progeny.

The cases are legion requiring that due process requires more than is provided by the Tribal Court, e.g., Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209, 98 S.Ct. 1011 (1978), 55 L.Ed. Ward v. Monroeville, 409 U.S. 57, 93 S.Ct. 80, 35 L.Ed.2d 267 (1972). As to the requirement of an Indian Court of Appeals, see Johnson v. Chilkat Indian Village, 457 F.Supp. 348 (Ak. 1978)

We agree that Indian tribes are "distinct, independent, political communities retaining their original natural rights" in matters of local self government. Worcester v. Georgia, 31 U.S. (6 Pet) 515, 559, 8 L.Ed. 483 (1832). Insofar as non-Indian citizens of the various states are concerned; notwithstanding federal authority over both, as between a citizen and an Indian tribe, the tribe stands as a subjugated sovereign. While it has the power to

make its own substantive law with respect to internal matters, Roff v. Burney, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897), it has no power to create a Tribal Court that abridges the constitutional rights of non-reservation, non-Indian citizens of the United States.

The Court of Appeals' reliance on Section 14.7-C of the tribal code to dismiss the constitutional challenge that no non-Indian can receive a fair trial in the tribal court, commensurate with any semblance of due process is sophistry.

THE COURT OF APPEALS WAS AT A MINIMUM REQUIRED TO REMAND THIS MATTER TO THE TRIAL COURT TO DETERMINE WHETHER OR NOT THE TRIAL COURT SHOULD RETAIN JURISDICTION AND REFER IT TO THE TRIBAL COURT OR IN THE ALTERNATIVE, COULD PROCEED WITH THE CASE WITHOUT REQUIRING THE EXHAUSTION OF TRIBAL REMEDIES

Even assuming, arguendo, that the Court of Appeals was correct in that the Petitioners should be required to exhaust their tribal remedies, the Court violated the mandate of National Farmers that:

> "Whether the federal action should be dismissed or merely held in abeyance pending the development of further tribal court proceedings, is a question that should be addressed in the first instance by the District Court."

The Court of Appeals on page 12 of the Slip Opinion said, "Because the District Court has already determined that dismissal rather than abeyance of the federal case is appropriate, we need not remand the case to the District Court."

By not remanding the case to the District Court, the Court of Appeals cut-off any possible remedy that the Petitioners will ever have to litigate their §1983 and pendent claims against the Respondents below. The case cannot be re-filed in the District Court as the statute of limitations has long since run. It is clearly appropriate that the District Court retain jurisdiction while referring the matter to the Tribal Court in the event that exhaustion is required. To say that the District Court had already determined that dismissal rather than abeyance of this case was appropriate is non-sense. The District Court determined no such thing. The District Court granted summary judgment without opinion and without any statement in the record as to the reasons for

dismissal. This occurred on the 16th day of May, 1985. This Court's decision in National Farmers was not even rendered until June 3, 1985. This was long after the District Court had dismissed the case without ever considering this Court's determination that federal question jurisdiction gave the federal courts jurisdiction over this suit and the pendent claims as well as the §1983 claims because the federal question of the tribal court's jurisdiction was involved. To say that the District Court considered holding the case in abeyance while it referred it to the tribal court for a fuller development of the record in that tribunal flies in the face of the record and common sense.

At the very least, the Petitioners should be entitled to exhaust their tribal remedies, which no one knew they were required to do until this Court's decision in National Farmers. Their only remedy for the harm done them by the Respondents below has been eliminated by the action of the Court of Appeals.

It is respectfully submitted that this Court should correct that fundamental error.

CONCLUSION

It is repsectfully submitted that the Petition for Certiorari should be granted and the conflict between this Court's opinion in National Farmers Union Insurance Company v. Crow Tribe, supra, should be resolved and that the matter be remanded to the District Court, in the event that exhaustion is required, so that the District Court can hold this federal suit in abeyance pending a full development of the record in the tribal court.

Respectfully submitted,

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APPENDIX "1"

SLIP OPINION OF UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT

pgs. 21-39

UNITED STATES COURT OF APPEALS

FOR THE NITH CIRCUIT

A & A CONCRETE, INC., KAYLE ADAMS and SANDY ADAMS,	)	No. 85-2165
Plaintiffs-Appellants,	)	D.C. No. C-79-0667-PHX-WEC
v.	)	
THE WHITE MOUNTAIN APACHE TRIBE, CHARLES A. PATTERSON, VIOLET PATTERSON, KENNETH PATTERSON, SHIRLEY PATTERSON, et al.,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court for the District of Arizona
Walter E. Craig, District Judge, Presiding

Argued and submitted January 17, 1986
San Francisco, California

Before: SNEED, ANDERSON, and ALARCON, Circuit Judges.

ALARCON, Circuit Judge.

Appellants A & A Concrete, Inc., Kayle Adams and Sandy Adams (collectively "appellants") appeal from the district court's grant of summary judgment in favor of the appellees, on appellants' complaint for deprivation of civil rights, conspiracy to deprive them of their civil rights, and related pendent state tort claims. Appellants also appeal

from the district court's order denying appellants' cross-motion for summary judgment predicated on res judicata and collateral estoppel grounds. Because appellants failed to exhaust their remedies in the White Mountain Tribal Court, we conclude that federal review of appellants' claims is premature and affirm.

I

In June 1978, Kayle Adams contracted with the White Mountain Apache Development Enterprise (an economic subsidiary of the White Mountain Apache Tribe) to supply concrete to a housing project to be constructed on the Fort Apache Indian Reservation for the use of tribal members. At the formation of the contract and throughout its term, the Tribe was represented by Charles Patterson, general manager of the Development Enterprise. Pursuant to the contract, the concrete was required to conform to certain strength standards.

In late 1978, Charles Patterson bought stolen heavy construction equipment. He and Kayle Adams were arrested. In February 1979, Adams told Patterson that he was going to testify against Patterson. Patterson threatened to kick Adams

off the reservation if he did so. Adams did not testify, and Patterson was subsequently acquitted of the charge.

Sometime early in 1979, the Tribe became aware that Adams had furnished substandard concrete. The substandard character of the concrete necessitated dismantling houses built on defective foundations. The Tribe withheld payment for the materials and brought an action against appellants in the tribal court for breach of contract. Appellants contend that the tribal court lawsuit was the result of a conspiracy to retaliate against Adams for threatening to testify against Patterson.

Appellants were served with the complaint by Navajo County Sheriff's deputies Charles Lane and Gene Russell, and Russell Lupe, a Whiteriver police officer and a tribal court process server. It is unclear which of these persons actually handed Adams the tribal court documents.

Upon the advice of counsel, appellants ignored the service of process and allowed the time to answer to lapse. Appellants did not enter a special appearance in tribal court or otherwise attempt to challenge the tribal court's

jurisdiction. On February 6, 1980, the tribal court entered a default judgment against appellants in the amount of $250,000 plus costs and interest.

Pursuant to a writ of execution, the Chief of Police of the Whiteriver Police Department levied on two pieces of equipment belonging to appellants. The Development Enterprise purchased both items of equipment at the court-ordered sale. On the advice of counsel, appellants entered the reservation in September 1980 and removed one of the pieces of equipment.

Kayle Adams was thereafter indicted in federal district court for theft of tribal property. These charges were dismissed by Judge James A. Walsh in December 1980, on the ground that the tribal court lacked jurisdiction to enter the default judgment in the civil suit against Adams.

On November 15, 1979, appellants filed a first amended complaint in district court against the Tribe, doing business as White Mountain Apache Enterprises, the White Mountain Apache Housing Authority (charged with administering housing construction on the reservation), Charles Patterson,

and a number of other individual defendants. The complaint alleged (1) conspiracy to deprive the plaintiffs of their civil right to due process; (2) deprivation of civil rights; (3) wrongful garnishment and levy of execution; (4) breach of contract; and (5) unlawful interference with plaintiffs' contract with a third party, Okland Construction. The complaint was dismissed for want of jurisdiction on February 29, 1980. On appeal, this court affirmed the dismissal of the complaint with respect to the second count and reversed and remanded the case with respect to the remaining claims. A & A Concrete, Inc. v. White Mountain Apache Tribe, 676 F.2d 1330 (9th Cir. 1982) (A & A Concrete I). The White Mountain Apache Housing Authority was subsequently dismissed as a party with prejudice.

On February 22, 1985, appellees moved for summary judgment. Appellants filed a cross-motion for summary judgment. On May 13, 1985, the district court granted appellees' motion and denied appellants' cross-motion.

II. STANDARD OF REVIEW

We review a district court's grant of summary

judgment de novo. Grigsby v. CMI Corp., 765 F.2d 1369, 1373 (9th Cir. 1985). We apply the same standard as that employed by the trial court under Fed. R. Civ. P. 56(c): we will affirm only if the record, read in the light most favorable to the non-moving party, reveals no genuine issues of material fact and establishes that the moving party is entitled to judgment as a matter of law. Id.

The district court's decision to deny appellants' cross-motion for summary judgment is also reviewable de novo: whether res judicata or collateral estoppel operates to bar claims is a mixed question of law and fact subject to de novo review. United States v. Geophysical Corp., 732 F.2d 693, 697 (9th Cir. 1984).

III. APPELLEES' MOTION FOR SUMMARY JUDGMENT

Appellees assert three grounds in support of the district court's summary judgment award: (1) appellants failed to exhaust their remedies in tribal court and federal review is thus premature; (2) the Tribe and its employees are immune from suit; and (3) appellants have not established the existence of state action on their section 1983 claim. The district court did not specify the

ground on which it granted summary judgment. We may affirm the district court on any basis fairly supported by the record. Hoohuli v. Ariyoshi, 741 F.2d 1169, 1177 (9th Cir. 1984) (citing Goodisman v. Lytle, 724 F.2d 818, 820 (9th Cir. 1984); United States v. 101.80 Acres of Land, 716 F.2d 727 n.24 (9th Cir. 1983)). Because we conclude that summary judgment was proper on the first ground, we do not reach the second and third grounds proffered by appellees.

Appellants contend that they were excused from their obligation to exhaust their remedies in tribal court because the tribal court lacked subject matter jurisdiction to hear the instant dispute. Appellants argue that the question whether the tribal court had jurisdiction to hear the dispute is a federal question which must be resolved by the district court.

The Supreme Court addressed this issue in National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. ____, 105 S.Ct. 2447 (1985). In National Farmers, a Crow Indian obtained a default judgment in tribal court against a school district located within the Crow reservation for damages sustained when he was struck by a motorcycle

in the school parking lot. Id. at 2449. The school district and its insurer brought an action for injunctive relief in district court, invoking the court's federal question jurisdiction under 28 U.S.C. §1331. Id. at 2450. The district court held that the tribal court "lacked subject-matter jurisdiction over the tort that was the basis of the default judgment," and entered an injunction against execution of the tribal court judgment. Id. We reversed without reaching the merits, finding that the district court's exercise of jurisdiction could not be supported on any constitutional, statutory, or common law ground. Id. at 2450 & n.3.

The Supreme Court held that the district court had jurisdiction under section 1331 over the federal question whether the tribal court had the power to compel a non-Indian property owner to submit to the jurisdiction of the tribal court, see id. at 2452; however, the existence and extent of a tribal court's jurisdiction requires an examination which "should be conducted in the first instance in the Tribal Court itself." Id. at 2454. The Court opined that Congress' commitment to a policy of supporting tribal self-

government and self-determination favors a rule "that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." 105 S.Ct. at 2454 (footnote omitted). The Court commented:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Id. (footnote omitted). The Court reasoned that if such an examination were performed by the tribal court, a full record could be developed and other courts would benefit from the tribal court's expertise in the event of further judicial review. Id. Because the issue "[W]hether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District

Court," the Supreme Court remanded the case to the district court. Id. at 2455.

National Farmers makes no distinction between personal injury actions and other civil matters arising within the territory governed by the tribe. See id. at 2452. The Supreme Court has repeatedly recognized that tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on the reservation. See, e.g., Montanta v. United States, 450 U.S. 544, 566 (1981); Santa Clara Pueblo v. Martinez 436 U.S. 49, 65 (1978); accord, Hardin v. White Mountain Apache Tribe, Nos. 84-1912 and 84-2164, slip op. at 4-5 (9th Cir. December 27, 1985) (as amended); Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983), cert. denied, 104 S. Ct. 2655 (1984).

It is undisputed that the transactions which form the bases for appellants' claims occurred or were commenced on tribal territory. We have previously held that a tribal court has initial power to determine its own jurisdiction to attach property belonging to a non-Indian during a building warranty dispute involving housing built on the

reservation and paid for by the tribe's representative. See R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 985 (9th Cir. 1983) (fact that contract involved housing to be built on the reservation, to be occupied by reservation members and paid for by an agency representing the tribe, established reservation as locus of contract dispute), cert. denied, 105 S. Ct. 3476 (1985); see also Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592-95 (9th Cir. 1983) (court upheld tribe's right to regulate conduct of automobile dealer on tribal lands in repossessing vehicles purchased by Indians off the reservation), cert. denied, 104 S. Ct. 1707 (1984).

Appellants nevertheless argue that this case falls within the narrow exception to the exhaustion requirement which the Court outlined in a footnote to the National Farmers case:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," ... or where the action is patently violative of express jurisdictional prohibitions,

> or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

105 S.Ct. at 2454 n.21 (citation omitted).

Appellants first maintain that the instant action is patently violative of express jurisdictional prohibitions contained in the Tribal Law and Order Code. Chapter II, section 21.1 of the Code provides: "The Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all suits wherein an Indian or a member of the White Mountain Apache Tribe is a party." Appellants argue that because the Tribe itself brought the action in Tribal Court and it is neither an "Indian" or "a member of the ... Tribe," the tribal court lacked jurisdiction. Appellants cite Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979) in support of the proposition that the word "person" does not include a sovereign entity. Appellants' reliance on Wilson is misplaced. In fact, Wilson supports the Tribe's construction of the Code.

In Wilson, the Supreme Court construed 25 U.S.C. §194, which provides: "In all trials about

the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person ... ." Although the Court did find that the term "white person" did not include the sovereign, it also squarely rejected the argument that the statute does not apply when an Indian tribe, rather than one or more individual Indians, is the litigant. Id. at 665, 667. The Court noted that statutes passed for the benefit of Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians. Id. at 666.

Moreover, the "[i]nterpretation of a tribal ordinance is one of the duties of a tribal court." R.J. Williams Co., 719 F.2d at 983 (holding that question whether Fort Belknap Housing Authority is a "member" of the Fort Belknap Indian Community as that word is used within tribal court jurisdictional statute is a matter for the tribal court). Appellants' arguments regarding the tribal legislature's intent are better addressed to the tribal court. See id. at n.4.

Appellants next assert that exhaustion would have been futile because they would not have been

afforded a meaningful opportunity to challenge the tribal court's jurisdiction. Specifically, appellants argue that Anna Goseyun, Chief Judge of the tribal court, was so lacking in adequate legal training and biased by her connection with the tribal council that a hearing over which she presided would violate due process standards.

Appellants' failure to challenge Goyesun for bias or on competence grounds precludes them from raising this question in the federal courts. Section 14.7(c) of the Tribal Code permits any party to challenge a tribal court judge's qualification to hear the case. Appellants' failure to raise such a challenge because they assumed that it would be unsuccessful is not equivalent to raising the issue and having it resolved against them. See White v. Pueblo of San Juan, 728 F.2d 1307, 1313 (10th Cir. 1984) (plaintiffs' failure to seek tribal remedies because of their belief that none existed is not equivalent of pursuing the remedy; speculative futility does not justify federal jurisdiction); Galella v. Onassis, 487 F.2d 986, 997 (2nd Cir. 1973) (failure to comply with disqualification procedures of 28 U.S.C. §144 because of expectation of denial, however well-

founded, cannot be substituted for compliance). Appellants cannot avoid the plain import of the Supreme Court's decision in National Farmers in this manner.

Finally, appellants argue that exhaustion was not required under National Farmers because the tribal court action was motivated by a desire to harass. This exception to the exhaustion requirement, however, may not be utilized unless it is alleged and proved that enforcement of the state scheme was the product of bad faith conduct or was perpetuated with a motive to harass. See National Farmers, 105 S. Ct. at 2454 n.21 (citing Juidice v. Vail, 430 U.S. 327, 337 (1977)). No such proof appears in the record.

This case does not fall within any of the exceptions to the exhaustion requirement. Because the district court has already determined that dismissal rather than abeyance of the federal case is appropriate, we need not remand the case to the district court. Summary judgment in favor of the Tribe was properly granted.

IV. APPELLANTS' CROSS-MOTION FOR SUMMARY JUDGMENT[1]

Appellants also contend that they were

entitled to summary judgment on res judicata or collateral estoppel grounds: they argue that Judge Walsh's decision in United States v. Adams that the tribal court lacked jurisdiction to enter the default judgment in the Tribe's civil suit against Kayle Adams precludes relitigation of that question. We disagree.

The doctrines of res judicata and collateral estoppel operate to preclude relitigation of claims or issues in a subsequent action between the same parties or those in privity with them. 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.405[1], at 178 (2d ed. 1984). While collateral estoppel may in some cases be available to estop a party to a prior proceeeding from denying what was there judicially determined, such a judgment cannot be pleaded offensively against a non-party to the prior action by one who was a party. See id. ¶ 0.411[1], at 387.

In the instant case, the Tribe was not a party to the criminal action against Adams. We have held that a person technically not a party to the prior action may be bound by the prior decision only "if his interests are so similar to a party's that the party was his 'virtual repre-

sentative' in the prior action. United States v. Geophysical Corp., 732 F.2d at 697 (quoting United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980)). Appellants have produced no evidence to show that the United States was the "virtual representative" of the Tribe in the criminal action, or indeed, that the Tribe has the right to participate in or control Adams' criminal prosecution. See American Safety Flight Systems, Inc. v. Garrett Corp., 528 F.2d 288, 289 (9th Cir. 1975) (non-party cannot be estopped to relitigate issues involved in an earlier suit unless he had "the right to participate and control such prosecution or defense").

Appellants' contention that the law of the case doctrine bars relitigation of the question of the tribal court's jurisdiction is equally meritless. Under the law of the case doctrine, a court is precluded from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case. United States v. Maybusher, 735 F.2d 366, 370 (9th Cir. 1984), cert. denied, 105 S. Ct. 790 (1985). In the instant matter, the doctrine is inapposite; appellants seek to apply Judge Walsh's decision made in a different case.

The district court properly denied appellants' cross-motion for summary judgment.

V. CONCLUSION

The existence and extent of a tribal court's jurisdiction in a civil action involving an Indian and a non-Indian requires an examination which should be conducted in the first instance by the tribal court itself. Appellants' failure to exhaust their remedies in tribal court is not excused under any of the exceptions outlined by the Supreme Court in National Farmers. Because the Tribe was not a party to the criminal action against Adams and appellants have not demonstrated the United States was the "virtual representative" of the Tribe in that action, principles of res judicata and collateral estoppel do not operate to preclude relitigation by the Tribe in tribal court of the question whether the tribal court had jurisdiction to enter a default judgment against appellants.

The judgment is AFFIRMED.

FOOTNOTE

[1] Although the existence of a cross-motion for summary judgment would ordinarily imply agreement between the parties that there are no disputed issues of fact, in the instant case the cross-motion is actually an alternative argument. Appellants' position is that (1) they are entitled to summary judgment on res judicata/ collateral estoppel grounds; or (2) if res judicata is not applicable, they have raised issues of material fact which make summary judgment inappropriate.

APPENDIX "2" (a)

42 USC §1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Historical Note

APPENDIX "2" (b)

28 USC §1331

pgs. 41-42

APPENDIX "2"

28 USC §1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any action brought against the United States, any agency thereof, or any officer or employee thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs on the plain-

tiff.

(June 25, 1948, c.646, §1, 62 Stat. 930; July 25, 1958, P. O. 85-554, §1, 72 Stat. 415; Oct. 21, 1976, P. L. 94-574, §2, 90 Stat. 2721)

APPENDIX "2" (c)

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "2" (d)

WHITE MOUNTAIN APACHE TRIBAL CODE,
SECTIONS 21.1, 14.7, 14.6

pgs. 44-46

APPENDIX "2"

Section 21.1 Jurisdiction

The Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all civil suits wherein an Indian or a member of t' White Mountain Apache Tribe is a party. In cases of divorce, the Tribal Court shall have jurisdiction where either the plaintiff or defendant is an Indian who is a bonafide resident of the Fort Apache Indian Reservation.

Section 14.6 Qualifications

Any person over the age of 21 years shall be eligible to serve as a judge of the White Mountain Apache Tribe if he:

1. is a member of the White Mountain Apache Tribe;
2. has never been convicted in any court of a felony; and
3. has not been convicted of a misdemeanor in any court within one (1) year prior to his election, with the exception of minor traffic offenses.

Section 14.7 Disqualification of Judge to Preside Over a Case

A. No judge shall hear or determine any case in which he has a direct interest or wherein a party or counsel for a party is one of the following relatives:

1. uncle or aunt;
2. niece or nephew;
3. grandparent or grandchild;
4. brother or sister;
5. mother or father; or
6. a spouse of one of the preceding.

B. The disqualifications in subsection A of this section shall apply whether or not the relationships are based on the whole or half blood, adoption or remarriage.

C. Any party to a proceeding may raise the issue of the qualification of the judge to hear the case.